Rules, Regulations and Laws Affecting Wildlife Management

Greg Yarrow, Professor of Wildlife Ecology, Extension Wildlife Specialist

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For some private forest and farm owners, complying with government mandated rules and regulations and fearing legal penalties for failure to do so can cause a good deal of anguish. In most cases, private landowners are more than willing to comply with regulations that protect their land. Unfortunately, because of the complexity of regulations, many landowners are left confused. Adding to this confusion are the continuing changes to regulations.

The information presented here will address important laws that affect private landowners, agencies that administer the laws, and the responsibility of landowners under the law. This discussion raises the issue of private property rights. A section on recreational access and liability for landowners who are contemplating providing recreational access to their property is also included.

Federal, State and Local Regulations

Prior to the passage of environmental laws and zoning ordinances, common law nuisance actions were one means of attempting to control environmentally destructive activities. These efforts, however, were usually ineffective. Most of the environmental laws and regulations on the books today were enacted to address environmental problems that were prevalent in the 1960s and 1970s. By the 1960s, many of the nation's waters were unfit for swimming, fishing or drinking. Air pollution and smog had been demonstrated to cause harmful effects on human health. Development had destroyed large areas of plant and wildlife habitat. Toxic pesticides often killed wildlife in addition to target species and threatened human health as well. Federal laws, many of which are implemented through state plans, have since been enacted to protect the environment. Environmental laws are designed to protect public health and welfare and the environment. However, the controls and costs they impose on natural resource management or other land uses are most often absorbed by private individuals or firms that own the land. Policy debates have raged among various land use interest groups. These have included private corporations and landowners who grow timber, environmental groups who seek more land use regulation, public agencies which are charged with implementing federal and state laws, congressional and legislative members who try to strike a balance between economic and environmental concerns, and judicial systems considering the merits of legislation regulating private property owners.

Today there are over 100 treaties, international agreements, federal statutes, executive orders and federal regulations that pertain to land use and wildlife regulation. This does not include state regulations, and in some cases local ordinances, that affect land use activities like forestry or agricultural operations (e.g. fire control ordinances, toxic waste management, wetlands). Current legislation centers around three broad topics that could affect forest, agriculture, and wildlife management practices: **endangered species, water quality,** and **air quality**. The presence of red-cockaded woodpeckers, gopher tortoises, and other endangered species affects forest and farm management and operations across portions of the southern landscape. Water quality legislation and regulation to control non-point source pollution affects management practices in wetlands and areas adjacent to streams and rivers. Air quality legislation or guidelines affect smoke management from prescribed burning. Information presented here will focus on legislation, regulations and guidelines that could potentially impact how private landowners use and manage their lands. They include the following:

- Endangered Species Act
- Clean Water Act
- Clean Air Act
- Coastal Zone Management Act
- Federal Environmental Pesticide Control Act
- Cost-Share Recipient Responsibilities
- State and Local Statutes and Ordinances

Endangered Species Act

The Endangered Species Act (ESA) was passed in 1973 to prevent the extinction of animals and plants that are drastically declining and exist only in extremely low numbers. The ESA is one of the most far reaching laws ever enacted. The U.S. Congress established the ESA because it recognized that all species *"are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."*

An endangered species is one that is in danger of becoming extinct throughout all or a significant portion of its range. The ESA also protects species that are threatened with extinction within the foreseeable future. Legally, there is no practical difference between endangered and threatened species.

Very few people would disagree that we need to protect species in danger of being lost forever. But a question often raised is: "How much is society willing to sacrifice in order to save from possible extinction

an animal or plant that few people have ever seen or even fewer could identify?" This question has been played out in the Pacific Northwest, focusing on how to strike a balance between environmental, social, and economic needs in protecting the endangered northern spotted owl. In the Southeast, the endangered red-cockaded woodpecker poses similar challenges to natural resource management, regulating agencies, and private forest landowners.

How Does the ESA Affect Private Landowners?

Section 9 of the ESA prohibits the illegal possession, import, export, and interstate or foreign sale of a listed species. It also makes it illegal to "take" a listed species from the wild without an exemption or Section 10 ESA incidental take permit. **Take** is defined "to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect a listed species or attempt to engage in any such conduct." Taking also includes significant habitat modification or degradation that actually kills or injures an endangered species by impairing its breeding, feeding or ability to find shelter. If an animal on private property is listed as endangered or threatened, the landowner must avoid a "taking" of that animal. Penalties for violations can range from a warning and seizure of illegally held wildlife specimens and products, to civil fines of $25,000, or criminal fines of $50,000 and/or a year in jail. Plants do not have the same protection as animals under Section 9, except that it is unlawful to "remove and possess any [endangered plant] species from areas under federal jurisdiction; or maliciously damage or destroy any protected species on any area in knowing violation of any state law or regulation, including state criminal trespass law." If the activity may incidentally take or harm a protected species, landowners may apply for a Section 10 ESA incidental take permit. If approved, this provides limited protection from sanctions in the event of unintentional and unavoidable take of a protected species.

If you are involved in any federal programs (such as the USDA Farm Bill programs), Section 7 of the ESA requires the federal agency that administers the program to ensure that land use practices do not jeopardize the existence of a listed species or adversely affect **critical habitat**: areas that are crucial for the survival of the species. It does ***not*** require the private landowner to actively manage for a listed species as is required on federal lands. However, management activities must not adversely affect critical habitat.

In order to help landowners avoid inadvertent violations of the ESA, resource professionals can determine if any listed species occur on private property. If a listed species is located, arrangements can be made to have a biologist with the South Carolina Department of Natural Resources (SCDNR) or U.S. Fish and Wildlife Service (USFWS) provide landowners with guidance and management recommendations. Keep in mind that endangered and threatened species are rare, and the probability of one being on your land is very low.

The USFWS, the federal agency responsible for implementing the ESA, has indicated a willingness to help landowners find creative alternatives to continuing use and management activities, while at the same time not "taking" an endangered or threatened species. Examples of these efforts include an agreement reached with the USFWS and Georgia Pacific, a timber company with substantial land ownership in the South, concerning the red-cockaded woodpecker. In South Carolina, there is a red-cockaded woodpecker coalition of landowners and agencies dedicated to balancing protection of the species and at the same time managing land for timber and other commodities. South Carolina was one of the first states to initiate a program called "Safe Harbor" which provides protection for red-cockaded woodpeckers, but at the same time allows landowners to use and manage their lands. For more information about Safe Harbor contact either SCDNR or USFWS.

Landowners who have endangered or threatened species on their property are impacted, but their land management objectives may continue with the development of a Habitat Conservation Plan (HCP) with the USFWS. Once a HCP is approved and followed, the landowner is usually not required to make future management changes, even if the needs of the species change over time. The idea is to provide forest owners with an atmosphere of stability and certainty so that they can make the long-term investments necessary to manage private forest lands for profit, and at the same time protect endangered species. The HCP is part of the Section 10 process to obtain an incidental take permit. The HCP provides protection for the species, while the permit provides protection for the landowner should incidental take occur.

Red-Cockaded Woodpecker Procedures Manual for Private Woodlands

The USFWS, in an effort to give landowners guidance about managing red-cockaded woodpeckers on their lands, has developed a "Red-cockaded Woodpecker Procedures Manual for Private Woodlands." The manual is more flexible than the Biological Assessment Guidelines, which is a general management policy on federal lands. For more information about the manual contact the nearest USFWS office.

The ESA also calls for the federal government to encourage, with financial assistance and through incentives, activities by states and others to develop and maintain conservation plans to restore populations of listed species to a point where they no longer are in danger of extinction. Some USDA Farm Bill programs provide private landowners with "positive" incentives to protect, manage, and enhance threatened and endangered species habitat. Work is also underway to develop economic incentives for the landowners through cost-sharing assistance, valuable credits (special credits for managing endangered species habitat), or other creative alternatives that protect private property rights and achieve the goals of the Endangered Species Act.

Endangered Species Pesticide Protection Program

For several years the Environmental Protection Agency (EPA) has been working on ways to protect endangered species from the risk of pesticides. EPA has developed an Endangered Species Pesticide Protection Program with the goal of reducing pesticide exposure to endangered species. The new program ranks each endangered species according to its status, recovery potential, vulnerability to pesticides,

potential for exposure, and apparent risks from pesticides. The USFWS will consider all of this information and then issue a biological opinion as to whether the species could be harmed by pesticide exposure. If a species is considered in jeopardy from pesticide use, the EPA and USFWS will, in most cases, prepare a bulletin for each county where the species is found. Bulletins include habitat maps and descriptions, and pesticide use restrictions. Bulletins are available from local county Extension offices and from pesticide dealers and distributors.

So, what if you pick up a bulletin and find that the area you plan to spray is mapped as a possible habitat for an endangered species? First, read the text under the map. It often explains more about the map and the endangered species. For example, it may give specific habitat descriptions which would eliminate the area you are about to spray as endangered species habitat. The focus of the program is education, not enforcement. Some states have developed creative programs, like landowner agreements, to ease the burden on landowners. If you have questions about the program, call the local EPA office or EPA's toll free number: (800) 447-3813. EPA can tell you if bulletins have been issued where you intend to spray.

Clean Water Act and Wetlands Regulation

Congress passed the Water Pollution Control Act in 1948 to provide technical and financial cooperation to states and municipalities that implement programs to reduce stream pollution from municipal and industrial waste, otherwise known as point source pollution. This act declared it to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states to control water pollution. The emphasis on public health concerns in the Water Pollution Control Act was altered with the passage of amendments to the Act in 1972, called the Federal Water Pollution Control Act. These amendments established a national goal of eliminating all pollutant discharges into the waters of the United States and making all waters safe for fishing and swimming. The 1972 Federal Water Pollution Control Act became known as the Clean Water Act.

The Clean Water Act was the first federal legislation to address pollution caused by storm water runoff from the landscape. Over half of the water pollution in the U.S. is caused by non-point source pollution such as agriculture, mining, urban and construction activities, and forestry. Contrary to public perception, forestry is only a minor contributor to the total nonpoint source pollution in the Southeast. The Act also identified the need to protect wetlands from unwanted human disturbance.

Two sections of the Clean Water Act established the legal framework for non-point source pollution control; Section 208 and Section 404. Section 208 requires all states to assess damages to water quality from non-point source pollution and to develop either regulatory or non-regulatory programs to control them. In the South, most states have chosen to develop non-regulatory programs that contain management guidelines like the Best Management Practices (BMPs) for forestry. The lead agency in South Carolina for developing mandated programs under the Clean Water Act is the Department of Health and Environmental Control. South Carolina's BMPs for Forestry manual can be obtained from the South Carolina Forestry Commission. Section 404 of the Clean Water Act established a regulatory program for the disposal of dredged or fill materials in navigable waters. This section is regulated by the U.S. Army Corps of Engineers with oversight by the EPA. Much debate and litigation has occurred over what constitutes "navigable waters." Following litigation in 1977, the Corps of Engineers expanded the regulatory definition of navigable waters to include wetlands. Wetlands only became regulated in 1977 after the Corps was forced to include them by order of the court. The following definition of wetlands is used to administer the Section 404 permit program:

> *"...those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include, swamps, marshes, bogs, and similar areas."*

Once the definition was established determining what was being regulated, the debate shifted to how to identify or delineate a wetland. Landowners need to know what parts of their property require permits to carry out certain management activities. Unfortunately, there are no boundary markers telling landowners where a wetland begins or ends. In most cases, wetlands can only be identified and marked by natural resource professionals who have sufficient training to recognize vegetation, soils, and hydrology to make wetlands determinations. The delineation process is complex.

One benefit for landowners under Section 404 is an exemption for silvicultural (forest management), farming or ranching activities. In order to meet the exemption, the activity must be ongoing *"normal farming, silvicultural, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products"* and must not convert a wetland to an upland site. The rules also state that *"new activities which bring an area into farming, silviculture, or ranching use are not part of an established operation."* In other words, landowners who want to begin farming, forestry, or ranching on lands not previously managed for these activities are not exempt from permit requirements. Additionally, while normal harvesting is exempt, this "...does not include construction of farm, forest or ranch roads." These activities and other silvicultural practices must comply with mandatory federal BMPs for forested wetlands. Landowners managing wetlands for timber production must follow appropriate federal and state BMPs in order to be exempt from permit requirements. When constructed in wetlands, roads and skid trails that meet the mandatory federal BMPs do not require permits. A written management plan, records of management activities, and evidence of past silvicultural use will help forest owners demonstrate that their land management activities are indeed ongoing activities. Periodic harvests or other types of timber stand improvement practices also help demonstrate that silviculture is an ongoing activity.

Unfortunately for many forest landowners, EPA has a narrow definition of "normal" silviculture. Landowners may run into problems meeting the exemption. EPA and the Corps of Engineers consider only timber management as silviculture. If the activity is specifically for wildlife management, recreation or other land use purposes, it will not qualify under this exemption. As an example, a forest landowner in Delaware was cited by the EPA for establishing a wildlife food plot in a wetland without a permit. EPA ruled that since the practice was for wildlife, it did not meet the silviculture exemption. The U.S. Forest Service and several other groups are currently working with EPA to widen their definition of silviculture to include multiple-use objectives. Until a final ruling is made, landowners who are planning to implement practices in **jurisdictional wetlands** (wetlands that are protected by the government) that are not related to timber management need to contact the Corps of Engineers to see if a permit is required. Even if a management practice is for silvicultural purposes, if it is going to impact a jurisdictional wetland, it ***must*** be performed in compliance with best management practices for the landowner's operations to remain exempt. A violation may cause a total loss of exemption.

If a management activity does not meet the silvicultural exemption, the Corps of Engineers has developed general and nationwide permits for a number of activities that have minimal impacts on wetlands. Nationwide permits were designed to regulate similar activities with little or no delay or paperwork. If the activity does not qualify for authorization under a nationwide permit, it may still be authorized by the U.S. Army Corps of Engineers by an individual or regional general permit.

Increased regulation of forestry operations is a possibility in the future if non-regulatory, non-point source pollution programs are not effective in protecting water quality. By practicing good stewardship through the use of BMPs during forestry activities, landowners are more likely to protect water quality in nearby streams and forestall further regulations. Effective communication with the Corps of Engineers will prevent potentially embarrassing situations which could delay management activities or result in fines. Both the EPA and the Corps of Engineers recognize the need to develop better communications with private landowners. Federal and state governments must also contribute by supporting programs that have a direct impact on wetland resources conservation and protection such as the USDA Farm Bill programs.

Wetlands on Your Property?

The USFWS has used aerial photography and satellite imagery to map general wetland areas on U.S. Geological Survey topographical maps. You can obtain a copy of National Wetland Inventory maps by calling 1-800-USAMAPS. Ground checks should verify that one or more indicators from each of the three wetland parameters (wetland vegetation, hydric soil, and wetland hydrology) are present before an area can be considered a jurisdictional wetland. If you observe definite indicators of any of the three characteristics, you should seek assistance from either the local Corps district office, or someone who is an expert at making wetland determinations. The Corps office will assist you in defining the boundary of any wetlands on your property, and will provide instructions for applying for a Section 404 permit, if necessary. Legal advice and other professional recommendations should be a part of your planning process.

Normal forestry and farming operations are exempt from having to obtain a Section 404 permit from the Corps of Engineers if the activities follow the prescribed BMPs. In the Southeast, EPA has retained authority over forestry and farming activities as defined under Section 404. This means that the Corps can determine if wetlands are present in these areas, but only EPA can make the determination if the activities comply with the conditions necessary to be exempt from permitting.

If you intend to conduct forest and wildlife management practices in wetlands, you should contact the local South Carolina Forestry Commission (SCFC) office for advice. EPA has worked with the SCFC to ensure that your local forester is knowledgeable concerning EPA guidelines as they apply to forestry. The advice provided by local foresters can help you stay in compliance with the wetlands portion of the Clean Water Act, which carries penalties for non-compliance. Farming activities in wetlands should be coordinated through the local Natural Resources Conservation Service (NRCS) office.

Clean Air Act

In the Clean Air Act of 1970, the EPA was directed to identify and publish a list of air pollutants and to establish air quality standards for those pollutants in order to protect public health. A table of National Ambient Air Quality Standards, published by the EPA, identified primary and secondary pollutants and their maximum acceptable concentrations in the atmosphere. States were then directed, by the Act, to submit plans detailing how they intended to achieve and maintain the National Ambient Air Quality Standards.

Coastal Zone Management Act

The federal Coastal Zone Management Act provides a means for federal involvement in coastal zone protection. The definition of coastal zone includes not only those counties that border the ocean, but can also include areas that extend several counties inland from the ocean. The act requires that every state with a federally-approved program develop a plan to control coastal zone non-point source pollution according to guidelines set by the EPA.

Federal Insecticide, Fungicide and Rodenticide Act

After World War II, many new pesticides and herbicides were developed to control undesirable animals and plants. Public fears surrounding the findings that DDT accumulated in the food chain and caused animal mortality, along with the concerns that these chemicals may cause cancer, led to the passage of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The act authorizes EPA to classify and register the use of most herbicides, pesticides, fungicides and rodenticides. EPA decides on the safety of each proposed chemical and lists specific applications that are allowed for each pesticide. Chemical pesticides that are determined to be hazardous can be banned completely. Approved chemicals can only be used legally in accordance with their

EPA label guidelines. The act converts the product label of a pesticide or herbicide into a binding legal document. Landowners should carefully read and follow pesticide label instructions. Manufacturers are liable for damages caused only when a pesticide is used in accordance with label instructions. The Federal Environmental Pesticide Control Act has the following major provisions:

- All pesticides must be registered with the EPA.
- General-use pesticides are available to the general public, while restricted-use pesticides are available only to certified individuals.
- Private applicators may use pesticides on their own or leased property, and commercial applicators may apply restricted-use pesticides for a fee.
- Both private and commercial applicators must meet minimum standards of competency.
- Misuse of pesticides is unlawful.

Enforcement of regulations is delegated to designated state agencies, like the South Carolina Department of Health and Environmental Control (DHEC).

Local Ordinances

In recent years there has been a proliferation of local ordinances regulating land use, especially regarding forestry. According to a survey conducted by researchers at the Southern Forest Experiment Station, 461 local ordinances now exist across the U.S. Fortunately for farm and forest owners in the South, most of these local ordinances only apply in the Northeast.

Local forestry ordinances have varying objectives that reflect concerns of local governments and their constituents. Often a single ordinance will have multiple objectives. Land use and zoning ordinances can generally be placed into five categories based on the reason for establishing the ordinance. These include the following:

- Public property, health, safety, and welfare protection ordinances;
- Urban and suburban environmental protection ordinances;
- General environmental protection ordinances;
- Special feature, conservation and habitat protection ordinances; and
- Forest land preservation ordinances.

The type of local forestry regulatory ordinances that have proven to be the most popular in the South are those directed at the protection of public property and motorists' safety. To find out if your county or city has an ordinance that restricts certain farm or forest management activities, contact your local county or city government office, or your local South Carolina Forestry Commission office.

Cost-Share Recipient Responsibilities

Landowners who participate in federal programs are obligated to maintain the management practices for which the funds were received according to the terms of the contract. Cost-share recipients are also responsible for using cost-sharing funds in the manner for which they were intended, and not for something else. Some landowners worry that if they accept cost-sharing monies, they are more susceptible to federal regulations. In reality, federal and state laws apply regardless of whether you receive cost-sharing assistance or not. The responsibility for regulatory compliance is the same for cost-sharing recipients as it is for landowners who receive no cost-sharing assistance. The federal government makes clear its intention that cost-share assistance programs are not to be regulatory in nature. The Cooperative Forestry Assistance Act of 1978, that authorizes the USDA Farm Bill program clearly states that the Act does not authorize the Federal Government to regulate the use of private land or deprive landowners or states of any of their rights. Section 14 of the Cooperative Forestry Assistance Act states:

> *"This Act shall not authorize the Federal Government to regulate the use of private land or to deprive owners of land of their rights to property, unless such property rights are voluntarily conveyed or limited by contract or other agreement. This Act does not diminish in any way the rights and responsibilities of the States and political subdivisions of states."*

The Swampbuster and Sodbuster programs are two federal regulatory programs that primarily affect agricultural land. Both programs are administered through the USDA Farm Services Agency (FSA) and the USDA. Natural Resources Conservation Service (NRCS). The Swampbuster program prohibits all federal commodity program payments to landowners who put wetlands into production for commodity crops. Forest owners who plant wildlife food plots (especially when seeding plants that are used in agricultural production) in forested wetlands may also be considered in non-compliance and may lose cost-sharing assistance from federal programs. Before planting wildlife food plots in what might be a wetland site, be sure to first check with the local NRCS office.

Landowner Rights and Responsibilities

Ownership of private property is a valued concept, especially here in South Carolina, where over 75% of the forests and farms are owned by nonindustrial private landowners. The proliferation of environmental regulations that potentially limit what landowners do on their land has caused concern among many landowners and private property rights advocates. For example, the American Farm Bureau (which represents farmers in the U.S.) and other private property rights groups claim that environmental laws, such as the Clean Water Act's Section 404 wetlands protection program and the Endangered Species Act, are eroding constitutionally-protected private property rights. Most landowners enjoy exclusive rights to their property, but these rights are not absolute. The granting of easements, leases, or a mortgage on the property are common examples of instances in which landowners may not enjoy exclusive rights to their property. There are four rights or powers that are reserved to society that are exercised by the government. These rights reserved to the public include:

1. The right to tax,
2. The right to take private property (with just compensation) for public use through condemnation,
3. The right to regulate or control the use of private property, and
4. The right to escheat (the reverting of property to the state when there are no heirs or no will).

The Fifth Amendment provides protection against the "taking" of private property for public benefit without just compensation. A **taking** occurs when the government usurps or uses private property to the extent that the individual owner can no longer use it. But the loss of some "rights" to a property does not mean in all cases that the property is less valuable or provides fewer gratifications to the owner. Zoning laws may limit ownership rights, but they can also provide security against land uses on neighboring tracts that lower property values. Zoning ordinances are most common in urban and suburban areas.

Increasingly, landowners have depended on the courts as the last option to fight loss of property rights. Relying upon the expressed limitations contained in the Fifth Amendment that "nor shall private property be taken for public use without just compensation," the majority is precluded from trammeling the rights of the minority. The just compensation clause is used as a shield for protecting private property rights.

The Fifth Amendment, as interpreted for two centuries by the U.S. Supreme Court, provides for a reasonable and fair balance between public good and private property rights. The Supreme Court has recently applied the following guidelines when reviewing the impact of zoning or land use regulations on private property:

- The government restriction must substantially advance legitimate state interests, and
- The restriction must not deny the owner the economically viable use of his or her land.

The Court may also consider the extent to which the restriction limits the landowner's reasonable *investment-backed expectations,* or what a landowner could reasonably expect to receive from his or her investment in the property.

Since 1987, the Supreme Court has ruled in four landmark cases that private property rights cannot be eliminated through government regulation without just compensation. The tide has been slowly turning in favor of the property owner. In addition, "takings" laws are being proposed in most states which seek to protect landowner rights from misapplication of current regulatory laws by overzealous government regulators.

No one can be certain how far the movement to broaden the powers of the public over private property will go or how successful the opposing efforts of proposed private property legislation will be. Legislative actions and court decisions will continue to respond to the public sentiment either for or against programs and regulations to direct land use. If a landowner is concerned about eroding property rights and the impact of land use regulation, he or she should become informed on the latest developments and express concerns to elected officials or landowner associations and affiliates. By participation in voluntary programs like the Forest Stewardship program, following the BMPs, and avoiding practices that work against the basic rights and interests of others in the community, landowners can demonstrate responsible land stewardship and should be able to counter further erosion of private property rights.

Recreational Access and Liability: What Landowners Should Know

In the past, landowners have not been overly concerned about tort laws and regulations that affect the use and management of their property. Increasing demands for recreation by the public have prompted many landowners to develop recreational access programs, such as fee-hunting operations, which provide limited access to the public and help supplement landowner income.

One of the primary concerns of many landowners who are interested in establishing a fee-hunting operation is liability. Landowners almost always ask, when deciding on a recreational alternative for their lands, "Am I liable for damages if someone gets hurt on my property?" In many cases liability concerns have been the deciding factor in whether or not private lands are opened to the public for recreation. It's understandable that some landowners are reluctant to allow access to their property because they fear liability. However, many of these concerns are more perceived than real, since lawsuits against landowners for negligence are rare. This does not diminish the fact that the concerns of landowners are real and should be recognized and understood by those who allow use of their land for recreational purposes by others.

Landowners who allow recreational access on their property can significantly reduce their anxiety and risk exposure by understanding their legal responsibilities to those using their lands, meeting those responsibilities, and developing a sound program of risk reduction that protects both the landowner and land user.

Landowner Responsibility

Landowners have a legal and moral responsibility to ensure that conditions on their property are safe for their guests. Landowners interested in developing recreational operations should be aware of their responsibilities to land users. In most states in the Southeast, including South Carolina, the level of landowner responsibility depends on who comes on the land. For a landowner to be held liable for personal loss or injury, negligence must be proven. A landowner is most often and easily held liable for gross negligence or willful misconduct, such as setting traps aimed at deterring or harming trespassers. Beyond any intentional misconduct, the landowner must be proven to have breached the duty of reasonable care expected under the law. In determining a landowner's liability for injuries that may occur to someone on his property, the legal status of the visitor must first be determined. The duty of care owed to and expected by the land user, and therefore the landowner's liability, depends on whether the land

user is classified as a trespasser, licensee, or invitee. By law, the greatest degree of landowner responsibility is owed to guests categorized as invitees, with the least responsibility being owed to trespassers.

Trespasser

A trespasser enters land uninvited and without the consent of the landowner. Land users in South Carolina, such as hunters, must obtain written permission from the landowner before entering the property. Usually, landowners are only liable for trespasser injuries that result from willful misconduct. An example of willful misconduct would be if the landowner set booby traps with the intention of causing harm and/or death to the trespasser. Landowner responsibility goes one step further to children who are knowingly trespassing. In this case, landowners are required to exercise reasonable care to eliminate any dangers that pose an unreasonable risk of death or serious bodily harm to trespassing children. For example, if a landowner knows there is an open well on the property and also knows trespassing children are playing near the well, the landowner will be liable for any injuries that occur to the children if they fall into the well. A key element excusing landowner liability is the lack of knowledge of the trespasser's presence.

Licensee

A licensee enters property with the permission of the landowner and is not required to pay a fee or render a service for the right of access. In other words, licensees enter property to further their own purposes, not the landowner's. Guests who are friends, business acquaintances or family members are considered licensees. Landowners have a greater degree of responsibility to licensees than trespassers in that they have a duty to warn them of known dangers. For example, a landowner must warn visitors of a biting dog, an open pit, abandoned well, or cable gates.

Invitee

An invitee enters land for the benefit of the landowner by paying a fee or providing a service in exchange for the right of access. A hunter is usually considered to be an invitee where a fee is charged. The responsibility of the landowner to the land user increases, since a fee or service is required and the client assumes that the property and other conditions are safe. Landowners engaged in a fee-access operation must inspect their property for hidden dangers and make every effort to warn their clientele of all known hazards. If known dangers cannot be removed, the landowner must give adequate warning to the guests and explain where these hazards are located.

Reducing Landowner Liability

Reducing landowner liability involves developing and implementing a sound program of risk reduction. In a fee-hunting operation, for example, landowners should inspect their property for hazards. Some hazards may include open wells, abandoned mines, unsafe structures, or dangerous domestic or farm animals. The owner must make every effort to eliminate these hazards. Known dangers that cannot be corrected should be identified and explained to the land user. In other words, every effort should be taken to make conditions and the property safe. Meeting these obligations, as defined by law, will reduce the exposure and potential liability of landowners in recreational fee-access operations. Liability for personal injury cannot be imposed upon the landowner without proof of negligence.

A key component of a risk reduction program is **foreseeability** – being able to anticipate potential problems and acting in advance to reduce or eliminate the occurrence of these problems. Foreseeability is a vital factor in reducing risks. Recognizing that landowners provide a valuable service to the public by allowing public access to their lands, most states like South Carolina have enacted recreational use statutes that limit landowner liability for injuries to persons using the land for recreational purposes. These statues do not exempt landowners from injuries caused by willful and malicious activities, or the failure of the landowner to warn against known hazardous conditions without infringing on private property rights. These questions and others will no doubt be debated for some time to come. However, the important point in all the discussion is that landowners should be aware of current regulations and guidelines that affect how they manage their lands for timber, wildlife and other resources. In addition, farm and forest owners who are concerned about proposed regulations need to become involved in the regulatory process by letting their views be known about how proposed regulations will affect them. Finally, complying with voluntary land use guidelines such as BMPs, and developing a land ethic of stewardship will demonstrate landowners' commitment to and concern for the land and the environment.

A Checklist to Reduce Landowner Liability

- Identify all known and potential hazards on the property. Guests should be given a plat (sketch of the property and structures) of the property that marks hazards and identifies property boundaries. If possible, landowners or their representatives should tour the property with guests.
- Develop written rules aimed at preventing accidents and protecting the property. Make sure all visitors are aware of the rules. Have them sign a statement that they have read and understand all rules.
- Have land users sign a hold-harmless agreement (written release) prior to entering the property, stating that those using the land hold the landowner harmless of any consequences to the land user while on his or her land. Written releases may be helpful as proof that an injured land-user assumed the risks of engaging in an activity. It is important to note, however, that hold-harmless agreements do not relieve landowners of liability associated with demonstrated negligence. **Release statements should not be relied upon as a substitute for providing reasonable care to guests and visitors.**
- Avoid single strand wire or cable gates. Make sure all gates are clearly marked.
- Require that land users provide references to verify safe behavior and adherence to laws. For hunters, local SCDNR Conservation Officers are a good source to check to see if potential lessees have a history of game law violations.
- Post property against trespassing and prosecute violators.
- Plainly mark and show safety zones ("no hunting" areas) around houses, buildings, livestock, etc.
- Do not tolerate unsportsmanlike behavior or use of alcohol while hunting.
- Require that guests obey all state and federal game laws and regulations and show proof of having attended an approved hunter safety course.
- Encourage guests to exercise good judgement, common sense, and sportsman-like conduct.
- Keep accurate records of all efforts made to reduce or eliminate known and potential risks to landusers. If a suit is filed, landowners will have an accurate record of the efforts that were taken to make conditions on their property safe.
- Continually monitor risk potentials and make efforts to reduce them.
- Consult legal and professional experts.
- Landowners should require hunting clubs to have liability insurance coverage to minimize exposure to loss from liability and other risks. Landowners should be listed on the policy as being an additional insured party.